Supreme Court, U.S.
FILED
AUG 25 1971

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-282

ARNOLD STONEHILL, MICHAEL GRUBER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PAUL CARUSO,
425 South Beverly Drive,
Beverly Hills, Calif. 90212,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	2
Reasons for Granting the Writ	3
Conclusion	5

INDEX TO APPENDICES

Appendix A. Opinion of the United States District Court for the Central District of California ..... App. p. 1

Appendix B. Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 2

Appendix C. Constitutional and Statutory Provisions Involved ..... App. p. 3

TABLE OF AUTHORITIES CITED

Cases	Page
Nye and Nissen v. United States, 336 U.S. 613	3
United States v. Milby, 400 F. 2d 702	3
Wright v. U.S., 227 Fed. 855	3

Statutes	
United States Code, Title 26, Sec. 4705(a)	2
United States Code, Title 28, Sec. 1254(1)	1
United States Code, Title 28, Sec. 1651(a)	1
United States Constitution, Fourteenth Amendment	2

IN THE

Supreme Court of the United States

October Term, 1971

No. .....

ARNOLD STONEHILL, MICHAEL GRUBER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Arnold Stonehill and Michael Gruber, pray that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on May 11, 1971.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported. A copy of the opinion appears in Appendix A. hereto.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A), was entered on May 11, 1971. The Petition for Rehearing was denied on June 31, 1971. This Petition for a Writ of Certiorari is herewith filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under Section 28 U.S.C., §1254(1); §1651(a).

Questions Presented.

Petitioners are innocent persons who have been subjected to the imposition of criminal sanctions under a judgment of conviction obtained contrary to petitioner's legal and constitutional rights. The questions presented in the light of the undisputed record are:

1. Whether the United States Court of Appeals for the Ninth Circuit correctly ruled that the evidence was sufficient to sustain the judgment.

2. Whether the United States Court of Appeals for the Ninth Circuit correctly ruled that the evidence was sufficient to find agency between the petitioners and their co-defendants.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the Fourteenth Amendment to the United States Constitution and the provisions of the United States Code, 26 U.S.C., §4705(a), at the time of the plea, are printed as Appendix B. hereto.

Statement.

On February 26, 1970, the Federal Grand Jury for the Central District of California returned a three-count indictment naming the petitioners Arnold Stonehill and Michael Gruber, and two others, Carmine Peter Giorgio and Steven Franklin Sabin, with three violations of Title 26, United States Code, §4705(a)—the sale of cocaine to Federal agents on November 7, 1969, December 2, 1969, and January 24, 1970.

On June 8, 1970, petitioners filed waivers of trial by jury. The matter then proceeded to trial before the Honorable William P. Gray, on June 9 and 11, 1970. On the latter date, motions for judgments of acquittal

as to petitioners were granted on Counts I and III and both were found guilty on Count II. On July 6, 1970, petitioners were sentenced to a term of five years imprisonment, the execution of sentence to be stayed pending appeal.

On June 16, 1970, Notice of Appeal was filed for petitioners, the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the lower Court and denied petitioners Petition for Rehearing.

The verdict was sustained of the alleged facts that Federal Narcotics Agents working under cover, working through an undisclosed informant, purchased narcotics from the co-defendants but never from petitioners, who at the time of the sale, alleged in Count II, were in New York.

REASONS FOR GRANTING THE WRIT.

In order to sustain a criminal conviction the weight of the evidence must not be merely consistent with guilt but must support the conviction beyond a reasonable doubt.

Wright v. U.S., 227 Fed. 855.

The respondents herein do not contend that the petitioners were present when the December 2nd sale took place. The respondents contend, however, that the petitionrs aided and abetted on the commission of the offense, citing the cases of *Nye and Nissen v. United States*, 336 U.S. 613, 619, (1949); *United States v. Milby*, 400 F. 2d 702, 707, (9th Cir. 1968), as establishing their active participation in the criminal venture charged as encouraging the commission of the charged offense.

The petitioners contend that this reasoning and its proof as offered lacks a factual nexus between their co-defendants as their agents and themselves. Even if all the facts alleged by the respondents were admitted, there was no offer of proof to establish that the co-defendants, at the time of the offense charged, were acting within the course and scope of the criminal agency, or acting, in furtherance of any prior established criminal agency with petitioners.

It is consistent with petitioners' position, that their co-defendants were acting not as agents of petitioners but as principals in their own right. Petitioners have throughout, maintained their disassociation with their co-defendants. It is consistent with this contention that their co-defendants were not agents of the petitioners, but acting entirely for their own personal benefit and not within any criminal agency or conspiracy.

The evidence as presented in this case, is entirely circumstantial. It is arguable that where one is charged as a principal, having committed no overt act himself, the quantum of evidence required to sustain a criminal conviction based on the alleged overt acts of another, must necessarily be greater than that required where the evidence is direct. The burden is the same, but the relative strength of each evidentiary fact of direct evidence is substantially greater than that of circumstantial evidence. The petitioners' contention is that in considering the sufficiency of the evidence and the required burden of proof, the respondent has not met this burden nor proven guilt beyond a reasonable doubt.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and ruling of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

PAUL CARUSO,
Attorney for Petitioner.

APPENDIX A.

United States District Court for the Central District of California.

United States of America v. Michael Gruber *No.* 5560-Criminal.

Filed: July 6, 1970.

On this 6th day of July, 1970 came the attorney for the government and the defendant appeared in person and by counsel, Paul Caruso.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a finding of guilty has been convicted of the offense of illegal sale of narcotics in violation of Title 26 U.S.C. 4705(a) as charged in Count 2 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Count 2 of the Indictment.

IT IS ADJUDGED that pending appeal a stay of execution of the sentence of imprisonment is hereby granted.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

WILLIAM P. GRAY
United States District Judge.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Before: HAMLEY, DUNIWAY and HUFSTEDLER, Circuit Judges PER CURIAM:

Appellants Stonehill and Gruber appeal from their convictions for violations of 26 U.S.C. §4705(a) (sale of cocaine without an order form). They challenge the sufficiency of the evidence to sustain their judgments.

We have examined the evidence in the light most favorable to the Government, and we conclude that the evidence is ample to support the convictions. (*United States v. Nelson* (9th Cir. 1969) 419 F.2d 1237). Although neither appellant personally participated in the transfer of cocaine, there was sufficient evidence from which the jury could properly have concluded that the transferor was appellants' agent.

The judgments are AFFIRMED.

APPENDIX C.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

"No state shall . . . . deprive any person of life, liberty, or property without due process of law; . . ."

2. Title 26 United States Code, Section 4705(a).

"(a) General requirement.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

LIBRARY
SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
SEP 28 1971
E. ROBERT SEAVER, CLERK

No. 71-282

In the Supreme Court of the United States

OCTOBER TERM, 1971

ARNOLD STONEHILL AND MICHAEL GRUBER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-282

ARNOLD STONEHILL AND MICHAEL GRUBER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Central District of California, petitioners were convicted on count two [1] of a three-count indictment charging them and two others with various sales of cocaine to federal agents, in violation of 26 U.S.C. (1964 ed.) 4705(a). They each were sentenced to five years' imprisonment. The court of appeals

[1] Count two of the indictment charged that petitioners and two others sold approximately 47 grams of cocaine to a federal agent in Los Angeles on December 2, 1969. Co-defendant Giorgio was also convicted on this count, and on count one of the indictment relating to a separate sale. All charges against co-defendant Sabin were dismissed after trial.

445-361—71

affirmed *per curiam* (Pet. App. B), and, on June 31, 1971, denied a petition for rehearing. The petition for a writ of certiorari was filed on August 25, 1971, and is therefore out of time under Rule 22(2) of the Rules of this Court.

The evidence showed that on November 7, 1969, undercover narcotics agent Warren was introduced to co-defendant Giorgio in Hollywood, California, by an informant (Tr. 11–12).[2] Giorgio offered to sell an ounce of cocaine to Warren at $700 per ounce; when Warren said that he thought the price was a little high, Giorgio told him that it would be reduced if he would buy the cocaine in larger quantities (Tr. 13). Warren then expressed a desire to deal in pound quantities, but stated that he first wanted to make sure that Giorgio could provide ample ounces of good quality (Tr. 14). Giorgio assured Warren that he could, stating that he had been selling cocaine in the Hollywood-Beverly Hills area for a man who was originally from New York; that the man, who now lived in Hollywood, had been in the business for about fourteen years and traveled frequently between New York and Hollywood; and that this man had the cocaine sent out to him (Tr. 14). Warren then purchased the ounce of cocaine and handed Giorgio $700 (Tr. 14).

Approximately two weeks later, Warren again met with Giorgio and asked to purchase another two

[2] "Tr." refers to the transcript of the proceeding in the trial court, a copy of which we are lodging with the Clerk of this Court.

ounces of cocaine; Giorgio said he had been unable to get in touch with "his people" and asked Warren to wait. A meeting was then arranged between Agent Warren, Giorgio, and two men whom Giorgio referred to as his "connections" or "sources of supply" (Tr. 16).

This meeting took place on November 26, 1965. On that date, Warren and another federal agent met as planned with Giorgio and petitioners at a Pasadena restaurant (Tr. 16, 22). Warren informed petitioners that he had been advised by Giorgio that they were his source of supply and that if he wanted a good price on large quantities of cocaine he should talk with them (Tr. 18, 19, 51). Petitioner Gruber indicated that he could supply cocaine in any amount (Tr. 19) and would arrange transportation for the agents to New York in order that they could purchase the narcotics from his various contacts. Gruber emphasized, however, that the agents would have to deal through him personally (Tr. 20). Petitioner Stonehill then added that if the agents were going to distribute narcotics in the Hollywood area, "he would want Mr. Giorgio to have part of the action" (Tr. 21). With reference to any future purchase, the agents were told that they would have to "contact Mr. Gruber in New York through Giorgio" (Tr. 20).[3]

[3] Petitioner's involvement as Giorgio's contact was substantiated when co-defendant Sabin, at a later meeting with the agents, made statements to the effect that petitioners were in the cocaine trafficking business quite heavily, and that Giorgio was not the only person who was receiving cocaine from these two men (Tr. 34).

Stonehill assured the agents that he could deliver. He told them that the cocaine Giorgio had promised had not yet arrived but that it was in the mail from New York and was expected shortly (Tr. 22). When Stonehill questioned Giorgio about price, Giorgio said that he had gotten $700 per ounce for the first delivery to Warren, but that, if Stonehill approved, he would take $675 per ounce in the future (Tr. 21). On December 2, 1969, the two ounces of cocaine arrived and were sold by Giorgio to Warren at the $1,350 price agreed upon at the meeting (Tr. 24–25).

The trial court found that Giorgio was simply a "bag carrier," and that Stonehill and Gruber were guilty as principals (Tr. 123). Petitioners contend here, as they did below, that the evidence was insufficient to establish a factual nexus between them and co-defendant Giorgio since they were not physically present at the December 2 sale. But, the evidence detailed above, which petitioners do not dispute, clearly establishes petitioners' involvement in the offense charged and provides ample basis for the judgment of conviction on count two of the indictment. There is thus no cause for further review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.